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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

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MAY - 1 2009

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ARIZONA CORP COMMISSION
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Docket No. S-20631A-08-0503

In the matter of:

ROBERT FRANKLIN HOCKENSMITH, JR.,
CRD #1798614

Respondent.

**RESPONDENT ROBERT F.
HOCKENSMITH, JR.'S**

**RESPONSE TO MOTION FOR
PROTECTIVE ORDER**

(Oral Argument Requested)

(Expedited Ruling Requested)

Respondent responds in opposition to the Securities Division's ("Division") Motion for a Protective Order. The Division's motion seeks to block the deposition of a Division witness, Special Investigator Guy Phillips. **The deposition in question is scheduled for Tuesday May 5, 2009 at 10:00 am, so an expedited ruling is needed.** (A notice was also issued to Division CPA John Fink, but the Division has withdrawn his name as a witness, so his deposition is now moot).

I. Preliminary Statement.

The Division has fought discovery at every turn. Despite the ALJ's granting in part Respondent's Motion to Compel, the Division has yet to produce a single page of discovery. Now the Division seeks to block the deposition of its own designated witness. The Commission's rules freely allow for depositions. The Division argues that those rules are trumped by the Administrative Procedure Act's ("APA") limits on depositions. But the APA describes the minimum or floor level of discovery an agency must offer; it does not block the agency from granting greater discovery. In short, the Division confuses a floor with a ceiling.

The Division also argues that Investigator Phillips should be exempt from deposition for

vague “confidentiality” reasons. Rather than seeking to limit any specific confidential topics, the Division seeks a complete ban on the deposition. This remedy is too extreme. Moreover, the Division’s investigator is scheduled to publicly testify in only a few weeks. The only purpose for such a short period of confidentiality is to block Respondent’s ability to prepare for the hearing. The Commission should deny the Division’s Motion.

II. The Commission’s rules specifically allow for depositions.

The Commission’s rules provide that “The Commission, a Commissioner, or any party to a proceeding before it may cause the depositions of witnesses to be taken in the manner prescribed by law and of the civil procedure for the Superior Court of the state of Arizona.” A.A.C. R14-3-109.P. The rule is clear – a “party... may cause” the deposition of “witnesses”. The Division does not dispute that Respondent is a party, and that Mr. Phillips is a witness. And the rule is permissive – by using “may” it leaves the decision in the hands of the party. Respondent has exercised this option as allowed by the rule. Nothing further needs to be said.

The Division quotes the “manner prescribes by law” language, and argues that the deposition should be banned under the APA.¹ The Division fails to quote the following language: “and of the civil procedure of the Superior Court.” The Division’s omission is telling; it does not question the Phillips deposition would be allowed under the civil procedure rules. Instead the Division attacks those very civil rules an inappropriate – even though they are specifically incorporated in the Commission’s deposition rule.

The Division points to the APA’s discovery provisions. Those provisions provide a minimum level of discovery that an agency must allow. A.R.S. § 41-1062.A.4. Nothing prevents an agency from allowing additional discovery. Indeed, the APA provides that no other discovery is permitted “except as provided by agency rule.” *Id.* Here, the Commission has adopted a rule stating that any party “may” depose any witness, thus exceeding the minimum standards of the APA.

¹ Division Motion at 2.

1 The Division's argument is also inconsistent with past practice. Depositions have been
2 taken in prior Commission cases. For example, in the Reserve Oil case, Division witnesses were
3 deposed. *See* Decision No. 70630 (December 9, 2008)(noting depositions of Division witnesses).

4 Finally, even if the Division were correct that the Commission cannot exceed the minimum
5 standards of the APA, the Phillips deposition meets the standards specified in the APA. The APA
6 allows a deposition if the ALJ determines "reasonable need." A.R.S. § 41-1062.A.4. Here,
7 Phillips is the only Division employee listed as a witness. He will obviously be a key witness. Yet
8 Respondent does not know the substance of Phillip's testimony. Nor does the Respondent know
9 what documents, interviews, or other sources Phillips used to develop his testimony. Thus,
10 Respondent has a "reasonable need" for Phillips' deposition in order to prepare to cross-examine
11 Phillips. Accordingly, even if the ALJ agrees with the Division's highly restrictive view of
12 depositions, the ALJ should order the deposition of Investigator Phillips.

13 **III. The Division's vague confidentiality concerns are without merit.**

14 The Division also suggests that the Phillips deposition be blocked due to confidentiality
15 concerns. The Division argues that a deposition will "intrude into the confidentiality of the
16 investigative process."² But the Division does not ask that any specific topics or matters be placed
17 off limits as confidential. Rather, the Division seeks a blanket ban on the deposition of Phillips
18 (and by implication, all investigators in all cases). Respondent would be blocked from even
19 inquiring into basic matters such as Phillips' training and qualifications, or the specific documents
20 Phillips reviewed. There is no credible argument that such matters are confidential.

21 The Division also argues that the deposition should not be allowed due to an "ongoing
22 investigation"³ But the hearing is only weeks away; the time for investigation is long past.

23 In addition, the Division's confidentiality arguments are essentially identical to its
24 arguments in opposition to the motion to compel – that any disclosure of anything is barred by
25

26 _____
27 ² Division Motion at 4.

³ Division Motion at 4.

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1 confidentiality. The Administrative Law Judge has already rejected that vision. Moreover,
2 Commission proceedings routinely involve confidential information without giving rise to the
3 parade of horrors imagined by the Division.


4 Lastly, the Division argues that this deposition should be prohibited due to concerns about
5 "speed and cost-savings objectives." But the Division does not explain how this single deposition
6 will cause delay or undue expense (or even any expense) to the Division. And the primary concern
7 in Commission proceedings is not speed, but justice.

8 **IV. Conclusion.**

9 The Commission's rules freely allow a party to take the deposition of a witness. The
10 minimum standards of the APA do not trump the Commission's more permissive rule. And in any
11 event, there is "reasonable need" for the deposition of this key witness. The Division's
12 confidentiality concerns lack specificity, and their proposed remedy – a complete ban on
13 depositions of investigators – is far too broad. Moreover, Investigator Phillips will publicly testify
14 in the near future – the only question is whether Respondent will be allowed an adequate
15 opportunity to prepare by taking his deposition.

16 RESPECTFULLY SUBMITTED this 1st day of May, 2009.

17 ROSHKA DeWULF & PATTEN, PLC

18
19 By 

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7 Copy of the foregoing hand-delivered
8 this 1st day of May, 2009 to:

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